APPEAL NO. 042466
FILED NOVEMBER 22, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 26, 2004. The hearing officer determined that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the first and second quarters. The appellant (self-insured) appealed, arguing that the hearing officer's SIBs determinations are against the great weight and preponderance of the evidence. There is no response from the claimant in the file.

DECISION

Affirmed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criteria in issue are whether the claimant's unemployment is a direct result of the claimant's compensable injury and whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods for the first and second quarters. Rule 130.102(d)(4) provides that the good faith requirement may be satisfied if the claimant is unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to work.

The hearing officer did not err in determining that the claimant is entitled to SIBs for the first and second quarters. The self-insured argues that the hearing officer erred by exclusively relying on the opinion of Dr. G in finding that the claimant had no ability to work during either qualifying period and failed to consider the reports of Dr. K and Dr. H. The Appeals Panel has previously determined that whether another record shows an ability to work is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 000625, decided May 11, 2000. The hearing officer noted in the Background Information section that the work status reports prepared by Dr. K and Dr. H were based on incomplete and inaccurate medical conditions and that Dr. H failed to mention in his report that he used the wrong type and size of knee replacement in July 2002. The hearing officer commented that Dr. K, not being an orthopedist, based his evaluation on the report of Dr. H. The hearing officer reviewed Dr. G's report and found it persuasive in establishing that the claimant had a total inability to work during the qualifying periods for the first and second quarters of SIBs. With regard to direct result, the hearing officer found that the claimant's injury, while not the only reason that he could not work, was "a" cause of the claimant's unemployment. Again, the hearing officer relied on Dr. G's narrative in reaching his determination.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). Although there is conflicting evidence in this case, we conclude that the hearing officer's decision that the claimant is entitled to SIBs for the first and second quarters is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

(NAME)
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Veronica L. Ruberto
Appeals Judge

CONCUR:

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Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. The claimant seeks to meet the good faith job search requirement of Section 408.142(a)(4) by showing that he had a total inability to work during the qualifying period for the first quarter. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

In evidence are Work Status Reports (TWCC-73) dated in 2002 (before the qualifying periods at issue) from the treating doctor and a surgeon, releasing the claimant to full duty without restrictions and a report dated September 11, 2003 (just prior to the first quarter qualifying period) from Dr. H. He states that the claimant's "knee is doing great at this point. [The claimant] can't kneel on it but that is what I would expect." Other reports taking the claimant off work, in my opinion, deal with the claimant's Hodgkin's disease rather than the compensable knee injury.

In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject the records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 020041-s, decided February 28, 2002. In this case the hearing officer dismisses Dr. H's report because he "failed to mention that he used the wrong type and size of knee replacement in July 2002." Whether or not Dr. H did or did not is immaterial to whether the claimant had some ability to work during the period from September 18, 2003, to March 17, 2004. The hearing officer also rejects the treating doctor's reports because the treating doctor "is not an orthopedist and his evaluation was based on the evaluation of [Dr. H]." I note that Rule 130.102(d)(4) requires that "no other records show that the injured employee is able to return to work." Rule 130.102(d)(4) does not require a report from "an orthopedist" or for that matter need not necessarily even be from a doctor at all.

I believe that the hearing officer's decision that the claimant met the good faith job search requirement is against the great weight and preponderance of the evidence and I would have reversed the hearing officer's decision and rendered a new decision that the claimant was not entitled to SIBs for the first and second quarters because he failed to meet the requirements of Rule 130.102(d)(4).

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Thomas A. Knapp
Appeals Judge